sometimes apply substantive law based solely on state statutes,[4] is consistent only with the idea that the states have reserved to themselves the power to regulate maritime matters as to which uniformity throughout the country is unnecessary. That Congress has exclusive power to regulate admiralty matters concerning which uniformity is desirable has been squarely held;[5] that its power even over local matters is paramount, if it chooses to act, seems taken for granted.[6] Finally, as there is no federal common law,[7] the substantive law applied in admiralty must be the maritime law of the state, the application of which is delegated to the federal courts.[8]

A recent case holding that a state statute (abolishing the common law liability of employers for injury to employees and substituting therefor a compensation system) was prevented by the Constitution from applying to injuries sustained on navigable waters, seems inconsistent with the above reasoning. *The Fred E. Sander*, 208 Fed. 724. It may be argued that for a state to take away, by legislation, rights formerly adjudicated in admiralty is no less an infringement on the federal jurisdiction than is the recognition of strictly admiralty rights by state courts. But the analogy is misleading, for there is a sharp distinction between the powers of state legislatures, and those of state courts to deal with maritime matters. As seen above, state legislatures have power to act concerning local matters until Congress expresses an intent to exclusively cover the field.[9] But, on the other hand, state statutes allowing proceedings *in rem* in the state courts for marine torts are invalid, because to give common law courts jurisdiction over matters so essentially pertaining to admiralty procedure is to interfere with the exclusive *judicial* power delegated to the federal courts by the Constitution.[10] Since the statute in the principal case, like the state death statutes,[11] seems on a matter as to which uniformity is unnecessary, it is submitted that the decision is erroneous.[12]

THE PROBLEM OF INDUSTRIAL RAILWAYS. — The services rendered by industrial railways to their proprietary industries may be of three very different kinds. 1. The railway may be a true common carrier and thus be in the position of the initial or ultimate carrier as to the shipper industry. 2. The shipper with the permission of the carrier may perform part of the service that it would otherwise be the duty

---

[4] The J. E. Rumbell, 148 U. S. 1, 13 Sup. Ct. Rep. 498.

[5] The Roanoke, 189 U. S. 185, 23 Sup. Ct. Rep. 491.

[6] The language of the courts indicates clearly that if Congress does choose to act in a matter, it is paramount to all state action. See Butler *v.* Boston Steamship Co., 130 U. S. 527, 556–558, 9 Sup. Ct. Rep. 612, 618–619.

[7] Western Union Tel. Co. *v.* Call Pub. Co., 181 U. S. 92; Swift *v.* Phil. Reading R. Co., 64 Fed. 59.

[8] See The City of Norwalk, 55 Fed. 98–105.

[9] *Supra*, Note 4.

[10] The Hine *v.* Trevor, 4 Wall. (U. S.) 555.

[11] The Hamilton, 207 U. S. 398.

[12] The actual holding might be supported on the ground that the statute, by proper construction, has no application at all to workmen injured on navigable waters. But the court deems it necessary to force this construction to prevent the act being unconstitutional. The construction taken certainly was not the natural one, and it is submitted that it was entirely unnecessary. But *Cf.* Steamboat New York *v.* Rea, 18 How. (U. S.) 223; The Henry B. Smith, 195 Fed. 312.

of the carrier to perform, or he may furnish a facility that otherwise the carrier would be obliged to furnish. The most typical instance of this is the case of the shipper who furnishes his own cars. So by means of his industrial railway [1] the shipper may haul the consignments over some part of the route over which it would otherwise be the line carrier's duty to transport them. 3. The services of the railway may be exclusively that of a plant facility. It may be merely part of the appliances and equipment of the plant — engaged in carrying the raw material in process of manufacture from building to building, or from the plant to the line carrier — thus performing services that the carrier is not undertaking to do, any more than if the carriage were by dray.

Where the line carrier makes payments to these industrial railways for services rendered, no objection may properly be interposed, but the enormous drain on the line carrier, and the corresponding burden thus reflected upon other patrons of the line carrier, caused by payments to these railways under the guise of such services, though not in fact performed, is forcefully brought out in *The Industrial Railways Case*, 29 Int. Com. Com. Rep. 212.[2] What service is being rendered is a pure question of fact for the Interstate Commerce Commission. Regardless of the motives [3] which actuate the commission, the problem cannot be attacked on the principle that there should be an equalization of opportunity between the big shipper owning an industrial railway and the smaller ones having merely public spurs or who must content themselves with team tracks. "The law does not attempt to equalize fortune, opportunities, or abilities." [4] Therefore, if services are rendered they must be paid for. It would seem that the commission may lay down reasonable rules to govern its decisions on such questions. But these rules must not amount to legislation. Therefore, while the legislature might have laid down such a rule, it seems that the Commerce Court in *Louisiana & P. Ry. Co.* v. *United States*, 209 Fed. 244, was clearly right in holding that the commission could not make the question of what services were being rendered by the railway depend on whether or not the goods carried belonged to the proprietary industry.[5] It is true that these railways are usually incor-

[1] An industrial railway is a short line constructed primarily to serve the particular plant in the general interest of which it is owned and operated. Tap Line Cases, 23 Int. Com. Com. Rep. 277, 278.

[2] "The cost to the line carriers of the contribution by them in money and services, *per diem* reclaims, and demurrage exemptions to the few favored shippers shown on this record does not appear. It has been estimated at not less than $15,000,000 a year, and this we regard as conservative." It seems that the investigation was confined to the iron and steel industries east of the Mississippi River.

[3] See article by Bruce Wyman in this issue of the REVIEW at p. 545.

[4] United States *v.* Diffenbaugh, 222 U. S. 42, 32 Sup. Ct. 22; Louisiana & P. Ry. Co. *v.* United States, *supra*, 253.

[5] In the Tap Line Cases, *supra*, the commission laid down the following rules:

"1. Switching service within three miles of a trunk line is by custom included in the through rate.

"2. Such switching is a transportation service.

"3. For switching products of a proprietary mill located within the three-mile limit, no division of the through rate may be made, but an allowance under Section 15 may be paid either to the industry or its tap line, if the trunk line prefers to permit the industry or its tap line to do this work.

"4. For switching products of a non-proprietary mill an allowance may be given,

porated as an entity distinct from the industries that control them. This separation into different legal beings must be immaterial when the issue is the determination of what business the entity is engaged in.[6]

If it be determined that the railway is a true common carrier, it is as such entitled to a division of the through rate, the fact that the road is owned by the largest individual shipper over it being of no consequence in this connection.[7]

The determination that the service performed is of the second class, *supra, i. e.*, a service performed by the shipper in connection with transportation, depends on two other questions. First, what are the limits of the line carrier's transportation service? Does it extend up to the door of the proprietary mill so that when a shipment starts to move from that point it may be said that the line carrier's obligation as such has begun? This was the situation disclosed by the Tap Line Cases [8] where by custom the carriage extends up to any mill within three miles of the line carrier. Second, is the line carrier permitting the shipper to perform a part of this service that otherwise it would be obliged to do? If so, a fair allowance may be made in accordance with Section 15 of the Interstate Commerce Act.[9] It seems, however, that in the usual case the carrier's line does not extend up to the door of the industry, and that the carrier's obligation is fulfilled by a delivery onto the exchange track or onto a spur just clear

---

and in case of a common carrier tap line, a division out of the through rate may be made.

"5. But no allowance shall be made if the proper switching distance is or should be less than 1,000 feet.

"6. The benefit of the blanket rate is to be extended beyond the three-mile switching limit for a mill on or connected by switch (presumably not over three miles long) with a common carrier tap line and through the latter with a trunk line, provided only that the mill be not a proprietary industry as to the tap line. Neither allowance nor division is to be given the tap line for switching the products of such a proprietary mill." *Held*, that these rules were arbitrary. Louisiana & P. Ry. Co. *v.* United States, 209 Fed. 244, 255.

[6] Crane Iron Works *v.* Central R. R. of N. Y., 17 Int. Com. Com. Rep. 514; Star Grain, etc. Co. *v.* Atchinson, etc. Ry. Co., *id.* 338; Tap Line Cases, *supra*, 292.

[7] *Re* Division of Joint Rates, 10 Int. Com. Com. Rep. 385, 399; McCloud Lumber Co. *v.* Southern Pacific R. Co., 24 *id.* 89. This situation may be further complicated in the case of what is known as a tap line.

"The rails leading from the mill or through the timber and usually to a logging camp or company town have become known as the main line or 'tap line.' The spurs radiating into the forest from that point or from points along the main line are now usually referred to as the 'logging road.'" Tap Line Cases, *supra*, 285. If such a tap line be a common carrier, a through rate may be fixed originating at the timber with a milling-in-transit privilege. Central Yellow Pine Asso. *v.* Vicksburg, etc. Ry. Co., 10 Int. Com. Co. Rep. 193, 210.

Unless the railway is a true public carrier no division of the through rate may be made. Star Grain & Lumber Co. *v.* Atchinson, etc. Ry. Co., *supra*. See also Central Yellow Pine Asso. *v.* Vicksburg, etc. Ry. Co., *supra*, 210.

[8] See note 5, *supra*, rule 14. See also United States *v.* Baltimore & Ohio R. Co., 231 U. S. 274, 34 Sup. Ct. 75, where a railroad, though its rails ended on the Jersey side, extended its line by lighterage to New York. An analogous situation arises where the carrier furnishes a grain terminal by rental from the owner of an elevator instead of building one of its own. United States *v.* Diffenbaugh, *supra*.

[9] Of course in the matter of allowances or divisions, if so large an amount is paid as to amount to a rebate, or if allowances are made to some and not to others so that there is a discrimination, the problem is different. The question here is, how far may these sums properly be paid?

of the main track. Hence, service beyond that point is not what the carrier is bound to do, but an accessorial service for the benefit of the shipper, *e. g.*, switching and "spotting." Therefore the shipper should pay for it in addition to the through rate rather than be entitled to an allowance out of that rate.[10]

If the railway performs neither of these services, *i. e.*, if it is in Class 3, *supra*, it is merely an adjunct and an integral part of the industry, doing the shipper's work exclusively, and no payment may lawfully be made, as is pointed out both in *Louisiana & P. Ry. Co.* v. *United States*, *supra*, and *The Industrial Railways Case*, *supra*. This seems clear, for a carrier cannot pay the cost of carriage from a point off its line to a point on its line either for the purpose of getting business that otherwise it would not get or for the sake of developing new territory.[11]

If the industrial railway were performing one and only one of the three services outlined above, the problem would be a comparatively simple one. Usually, however, the carrier is found to be performing at least two of these services, not only for the proprietary industry, but for others. Thus the line of demarcation between the services it is rendering for which the line carrier should pay and those which are purely shippers' services becomes difficult and at times impossible to define.

It was found in *Crane Iron Works* v. *United States*, 209 Fed. 238, and in *Louisiana & P. Ry. Co.* v. *United States*, *supra*, that the industrial railways were engaged both in common-carriage and plant service, *i. e.*, carrying on both a public service and conducting a private enterprise. Clearly this may be true, but it would seem that except in an extreme case the commission would be justified in finding that such a situation did not in fact exist, first, because the nature of the businesses are so antagonistic,[12] and second, because in so far as the common carrier is transporting its own goods in interstate commerce it is doing an illegal act, in that it is violating the Commodities Clause.[13] It is clearly inconsistent with its public functions for a public-service corporation to engage in private business.[14] It seems doubtful whether the commission has power to prevent it under its authority to prevent discrimination.[15] But it would seem that the policy back of the Commodities Clause would go far enough to justify legislation compelling a complete severance of the two businesses.[16]

The situation arising when an industrial railway, though not a com-

[10] Industrial Railways Case, *supra*, 225. Such seems to be the method of dealing with this situation both in England and Germany. *Id.* 235.

[11] Wight *v.* United States, 167 U. S. 512, 17 Sup. Ct. 822. Chicago & Alton Ry. Co. *v.* Same, 156 Fed. 558, aff'd 212 U. S. 563. Central Yellow Pine Asso. *v.* Vicksburg, etc. Ry. Co., *supra*, 203.

[12] Prouty, C., in Kaul Lumber Co. *v.* Central of Ga. Ry. Co., 20 Int. Com. Com. Rep. 450, 455 *et seq.*

[13] See United States *v.* Baltimore & Ohio R. Co., 231 U. S. 274, 34 Sup. Ct. 75. Industrial Railways Case, *supra*, 246.

This latter objection, of course, would not be true in the case of tap lines, since timber and its manufactured products are excepted therefrom. Louisiana & P. Ry. Co. *v.* United States, *supra*, 254.

[14] WYMAN, PUBLIC SERVICE CORPORATIONS, § 703 ff.

[15] See Judson, INTERSTATE COMMERCE, § 214.

[16] See note 13, *supra*. See also Delaware, L. & W. R. Co. *v.* United States, 231 U. S. 363, 34 Sup. Ct. 66. Also 21 HARV. L. REV. 595; 22 HARV. L. REV. 250.

mon carrier, is doing plant service and also transportation service on behalf of the shipper under a proper allowance from the line carrier, will present difficulties so long as a shipper is permitted to furnish facilities of transportation in return for an allowance.[17] As has been pointed out above, in nearly every case where an allowance is thus paid for this haulage, the haulage is really done in behalf of the shipper and not the carrier, and therefore improperly paid. That much laxity has been permitted here in the way of allowances and extra services rendered by the carrier without compensation would appear from *The Industrial Railways Case, supra,* at page 226.

NEGOTIATION OF BILLS OF LADING UNDER COMMON LAW AND MERCANTILE THEORIES: NATURE OF INTEREST TRANSFERRED. — Misapprehension of the legal consequences of transferring by indorsement a negotiable bill of lading has been a fruitful source of litigation in mercantile communities. The prevailing view at common law is that a negotiation of the document, like a delivery of the goods, conveys only the interest which the parties intend shall pass.[1] But according to the custom of merchants, the person entitled on the face of the document to delivery of the goods, is likewise indicated as owner. To give this custom legal effect some of our principal commercial states have by statute[2] or judicial decision[3] adopted what may be called the mercantile view of documents of title. The results of most cases decided in accordance with this view may be explained on the theory that any one who comes within the terms of the promise to deliver has title to the goods,[4] just as on the better theory of promissory notes, anyone who brings himself within the terms of the promise to pay is conceived to be owner of the obligation.[5] But it seems more accurate to say that title does not pass to a holder who comes within the terms of the promise unless such was the intent. But if the owner of the goods placed the document in circulation, he is estopped by the representation on its face from denying that a *bonâ fide* indorsee for value acquires an indefeasible title.[6] In

---

[17] WYMAN, PUBLIC SERVICE CORPORATIONS, § 1359.

[1] The Carlos F. Roses, 177 U. S. 655; Straus *v.* Wessel, 30 Oh. St. 211.

[2] The most important statutes embodying the mercantile view are the SALES ACT (§§ 27–40), which has been passed in Alas., Ariz., Conn., Md., Mass.. Mich., N. J., N. Y., Ohio, R. I. and Wis.; the WAREHOUSE RECEIPTS ACT, passed in Alas., Cal., Col., Conn., D. C., Ill., Ia., Kan., La., Md., Mass., Mich., Minn., Mo., Neb., N. J., N. M., N. Y., Ohio, Ore., Pa., Philippine Is., R. I., S. Dak., Tenn., Vt., Wash., W. Va., and Wis., and the BILLS OF LADING ACT, passed in Alas., Conn., Ill., Ia., La., Md., Mass., Mich.; N. J., N. Y., Ohio and Pa. In the latter statute alone is the finder or thief of a document given power to transfer title by indorsement.

[3] Munroe *v.* Phila. Warehouse Co., 75 Fed. 545; Comm. Bank *v.* Armsby, 120 Ga. 74, 47 S. E. 589; and see Pollard *v.* Reardon, 65 Fed. 848, 849.

[4] This seems to be the principle underlying the following provisions of the BILLS OF LADING ACT: "A negotiable bill may be negotiated by any person in possession of the same, however such possession may have been acquired, if, by the terms of the bill, the carrier undertakes to deliver the goods to the order of such person, or if, at the time of negotiation, the bill is in such form that it may be negotiated by delivery."

[5] See Peacock *v.* Rhodes, 2 Doug. 633, 636; and Collins *v.* Martin, 1 Bos. & P. 648, 651.

[6] Munroe *v.* Phila. Warehouse Co., *supra*; Comm. Bank *v.* Armsby, *supra*; and see